APPENDIX.

REASONS (N.) (O).

1. Under the Constitutional Amendment of 1884 Sec. 6 designed to prevent repugnancy of Rulings between Courts of Appeals or between them and the Supreme Court, the word "rulings" means expositions of the law or the legal reason on which the Courts rested their judgments on the questions presented. Friedman v. Maryland Casualty Co., 71 S. W. 2d 491, 496, 228 Mo. App. 680.
(21 C. J. S. Sec. 195, at page 339.)

Ruling on Motion to Dismiss, or Nonsuit.

2. A ruling on a motion to dismiss has been held to be the law of the case as to matters thereby adjudicated. 74

74 Potts v. Village of Haerstraw, 93 F. 2d 506; C. I. T. Corporation v. Sanderson, 49 F. 2d 937; Weagant v. Bowers, 49 F. 2d 934; Commercial Union of America v. Anglo-South American Bank, 10 F. 2d 937; Piest v. Tide Water Oil Co., 27 F. Supp. 1021; Presidio Mining Co. v. Oberton, 261 F. 933, affirmed 270 F. 388, and certiorari denied; Martin v. Presidio Mining Co., 41 S. Ct. 535, 256 U. S. 694, 65 L. Ed. 1175; United Drug Co. v. Cordley & Hayes, 132 N. E. 56, 239 Mass. 334; Darling v. Abbot, 191 N. W. 20, 221 Mich. 449; Schickler v. Penrod Co., 227 N. Y. S. 331, 222 App. Div. 627; Barber v. Rowe, 193 N. Y. S. 157, 200 App. Div. 290; Sterling Bag Co. v. City of New York, 11 N. Y. S. 2d 297, 256 App. Div. 645; Henry v. New York Post, 5 N. Y. S. 2d 716, 168 Misc. 247, affirmed 8 N. Y.

S. 2d 1022, 255 App. Div. 973; Sterling Bag Co. v. City of New York, 4 N. Y. S. 2d 521, 168 Misc. 179; Halzer v. Deutsche Eichsbahn Gesellschaft, 28 N. Y. S. 2d 284.

A plea to the jurisdiction should not be entertained on a particular ground after a motion to dismiss based on the same ground has been overruled. Martin v. Chicago, etc. Electric R. Co., 77 N. E. 86, 220 Ill. 97.

3. Rulings of Different Judges; Those of Each Judge the "Law of the Case," and is Binding Upon Every Other Judge of the Same Court.

21 C. J. S. Section 195, at page 340, 2d Col.

Different Judges. Ordinarily becomes the law of the case in that court; 85 (Aachen & Munich Fire Ins. Co. v. Guaranty Trust Co. of New York, 24 F. 2d 465, reversed on other grounds, 27 F. 2d 674 and certiorari denied. (See 49 S. Ct. 83, 278 U. S. 648, 73 L. Ed. 560; Farmers' Loan & Trust Co. v. Miller, 298 F. 758, reversed on other grounds see 9 F. 2d 848) and one judge of a court should not ordinarily review or disturb the rulings of another judge of the same or a coordinate court in the same case. 86

86 U. S. ex rel. Hughes v. Gault, 13 F. 2d 225; Commercial Union of America v. Anglo-South American Bank, 102 2d 937; The Material Service, 11 F. Supp. 100, affirmed, Leathen Smith-Putnam Navigation Co. v. Osby, 79 F. 2d 280, certiorari denied 56 S. Ct. 370, 296 U. S. 653, 80 L. Ed. 465; Kings County Lighting Co. v. Nixon, 268 F. 143, affirmed Newton v. Kings County Lighting Co., 42 S. Ct. 268, 258 U. S. 180, 66 L. Ed. 550; Harris v. Chicago House Wrecking Co., 145 N. E. 666, 314 Ill. 500, reversing 226 Ill. App. 220; Second Nat. Bank v. Leary, 187 N. E. 611, 284

Mass. 321; United Drug Co. v. Cordley & Hayes, 132 N. E. 56, 239 Mass. 334; Henlun Holding Corp. v. Ess Bros. Holding Corp., 239 N. Y. S. 259, 228 App. Div. 102; Endurance Holding Corporation v. Kranmer Surgical Stores, 238 N. Y. S. 377, 227 App. Div. 582; Mutual Thread Co. v. Oriental Textiles, 176 N. Y. S. 313, 188 App. Div. 104; Western Manufacturing & Oil Co. v. American Spirits Mfg. Co., 1175 N. Y. S. 345, 187 App. Div. 230; Tallassee Power Co. v. Peacock, 150 S. E. 510, 197 N. C. 735; Rhode Island Co. v. Superior Court, 104 A. 634, 42 R. I. 5; Georgian Co. v. Britton, 139 S. E. 217, 141 S. C. 163; 15 C. J. 961 note 36 (g) (h), p. 963 Note 49.

4. Proper Judicial Comity would require me to follow my colleague. American Scantic Lince, Inc. v. United States, 27 Fed. Supp. 271; Brusselback et al. v. Cago. Corp., 24 F. Supp. 524, at page 531. The general rule is that a matter which is decided by any District Judge within the District should be, as a matter of comity without re-examination by another judge, so decided. United States v. Hirschhorn D. C., 21 F. 2d 758. See also, 21 C. J. S., Courts, Sec. 196.

5. United States v. Hirschhorn, just above.

(1) Confronted as I am by this array of judicial precedents I am considerably embarrassed in arriving at a decision as to what my own course should be, especially in view of the general rule that a matter which is decided by any District Judge in this district should be, as a matter of comity, without re-examination by another judge, so decided, and that among the opinions presented to me is one from this district.

6. In the absence of a ruling by an appellate court, a former ruling of a Federal District Court will thereafter be

followed by the Courts of that District. In re Markowitz, 233 F. 715. See also, Cyc. Fed. Proc. Sec. 685, at page 293.

7. The general rule is that a matter which is decided by any district judge within the district should be, as a matter of comity, without re-examination by another Judge, so decided. Cyc. of Fed. Proc. Sec. 685 (at page 293). Citing Long v. Dick, 38 F. Supp. 214.

8. Opinions of the Circuit Court of Appeals the "Law of the Case" and is Binding on the Same Court as well as the Court Below.

Cyc. of Fed. Proc. Sec. 684. Opinions of Circuit Court of Appeals.

(For further proceedings to be there taken in pursuance of such determination. 877 U.S.C.A. 28. See p. 28a of Appendix.)

In a system of jurisprudence founded upon stare decisis it does not lie within the domain of a court of first instance to take it upon itself to upset a rule of long standing without most pressing circumstances to demand it. McCarty v. Palmer, 29 F. Supp. 585. Circuit Court of Appeals decisions are therefore binding in their own circuit, on themselves and the district courts, in so far as they are in harmony with the decisions of the Supreme Court. E. Edelmann & Co. v. Triple A. Specialty Co., 88 F. 2d 852, certiorari denied 300 U. S. 680, 81 L. Ed. 884, 57 Sup. Ct.; In re King, 46 F. 2d 112; Hartford & New York Transp. Co. v. Rogers & Hubbard Co., 40 F. 2d 954, aff'd 47 F. 2d 189; In re Imperial Irrigation Dist., 38 F. Supp. 770; Burris v. American Chicle Co., 33 F. Supp. 104, modified, 120 F. 2d

218; Bourgois, Inc. v. Willingmyer, 33 F. Supp. 863; United States v. Rollnick, 33 F. Supp. 863; United States v. LaVine, 28 F. Supp. 113; United States v. Eighty Acres of Land in Williamson County, 26 F. Supp. 315; Cookson v. Louis Marx & Co., 23 F. Supp. 615.

A decision of a Circuit Court of Appeals is authoritative and binding upon a district court of the same circuit. Elliott v. Wheelock, 34 F. 2d 213; United States v. Goldman, 28 F. 2d 424; Young v. John McShain, Inc., 39 F. Supp. 521; Forstmann v. Rogers, 35 F. Supp. 916. A former decision from which the Supreme Court denied certiorari is especially binding. H. Wagner & Adler Co. v. Mali, 74 F. 2d 666.

9. (21 C. J. S. Sec. 195 at page 330.)

Previous decisions in same Case as Law of the Case.

A. Definition, Nature and Distinctions.

"Law of the case" is the controlling legal rule of decisions, as established by a previous decision, between the same parties in the same case. It is a rule of practice, and generally is distinguishable from res judicata and stare decisis.

"Law of the case" has been defined as the opinion delivered on a former appeal. 10

10 Hocker v. Louisville, etc. R. Co., 96 S. W. 526, 29 Ky. 1, 842; 36 C. J. p. 964 note 33. More specifically, it means that whatever is once irrevocably established as the controlling legal rule of decision between the same parties in the same case continues to be the law of the case, whether correct on general principles or not, so long as the facts on

which such decision was predicated continue to be the facts of the case before the court." 11

11 Gypsum Co. v. Columbia Casualty Co., 169 So. 532, 124 Fla. 633; Hutchings v. Roquemore, 150 S. E. 571; 40 Ga. App. 566; Harris v. Chicago House Wrecking Co., 145 N. E. 666, 314 Ill. 500; reversing 226 Ill. App. 220; Anderson v. Dougherty, 207 S. W. 474, 182 Ky. 800; Woodward v. Snow, 124 N. E. 35, 233 Mass. 267, 5 A.L.R. 1381; In re Taylor Estate, 2 A. 2d 317, 110 Vt. 80.

10. NATURE: The Doctrine of the law of the case is a rule of practice and not a principle of substantive law. 12

(12 Sands v. American Ry. Express Co., 198 N. W. 402, 159 Minn. 25; Perkins v. Vermont Hydro-Electric Corporation, 177 A. 631, 106 Vt. 367.)

It expresses the practice of the courts generally to refuse to reopen what has been previously decided in the same case. 13

13 Messinger v. Anderson, 32 S. Ct. 739, 225 U. S. 436, 56 L. Ed. 1152; Lewith v. Irving Trust Co., 67 F. 2d 855; Page v. Arkansas Natural Gas Corporation, 53 F. 2d 27, certiorari granted 52 S. Ct. 407, 285 U. S. 532, 76 L. Ed. 927 and affirmed 52 S. Ct. 507, 286 U. S. 269, 76 L. Ed. 1096; Davis v. Davis, 96 F. 2d 512, 68 App. D. C. 240, certiorari granted 58 S. Ct. 944, 304 U. S. 552, 82 L. Ed. 1523, reversed on other grounds 59 S. Ct. 3, 305 U. S. 32, 85 L. Ed. 27, 118 A.R.R. 1518, motion denied 59 S. Ct. 773; Fleming v. Campbell, 83 P. 2d 708; 148 Kan. 516; State v. Randazzo, 300 S. W. 755, 318 Mo. 761; Trustees of Cincinnati Southern Ry. Co. v. McWilliams, 18 Ohio App. 225; Russell v. Fourth Nat. Bank, 31 Ohio C. A. 193.

And is binding on every tribunal dealing with the case except one clothed with power to overrule and finally declare the law to be otherwise. 14

14 Lunn & Sweet Co. v. Wolfman, 167 N. E. 641, 268 Mass. 345; in re Wecker's Estate, 243 N. W. 642, 123 Neb. 504.

It is founded on public policy, in the interest of orderly judicial procedure. 15

15 Turner v. Kirkwood, 62 F. 2d 256, certiorari denied 53 S. Ct. 522, 289 U. S. 724, 77 L. Ed. 1474; Toy Nat. Bank of Sioux City Iowa v. Smith, 8 F. Supp. 638, reversed on other grounds; Hammerstron v. Toy Nat. Bank, 81 F. 2d 628, certiorari denied Toy Nat. Bank v. Mammerstrom, 57 S. Ct. 9, 299 U. S. 546, 81 L. Ed. 402 and Iowa Joint Stock Land Bank v. Hammerstrom, 57 S. Ct. 9, 299 U. S. 546, 81 L. Ed. 402, and Live Stock Nat. Bank v. Hammerstrom, 57 S. Ct. 9, 299 U. S. 546, 81 L. Ed. 402; In re Reamers Estate, 200 A. 35, 331 Pa. 117, 113 A.L.R. 589.

And is of special significance as applied to questions of law as distinguished from decisions on questions of fact. Gypsum Co. v. Columbia Casualty Co., 199 So. 532, 535, 124 Fla. 633. Distinguished from res judicata, and Stare Decisis.

11. The law of the case, res judicata, and stare decisis belong to the same family in that they have in view the termination of controverted questions of fact and law. 17

17 Gypsum Co. v. Columbia Casualty Co., 169 So. 522, 535m k24 Fla. 633; Scott. v. Scotts Bluff County, 183 N. W. 573, 106 Neb. 355; Perkins v. Vermont Hydro-Electric Corp., 177 A. 631, 106 Vt. 367.

The law of the case, however, is distinct from res judicata. 18

18 Southern R. Co. v. Clift, 43 S. Ct. 126, 260 U. S. 318, 67 L. Ed. 283, (note 18 34 C. J. p. 747 note 92 (a).) in that the law of the case does not have the finality of the doctrine of res judicata, 19 (19 Walker v. Gerli, 12 N. Y. S. 2d 942, 257 App. Div. 249, vacated, 14 N. Y. S. 2d. 278, and re Reamer's Estate, Supra) and applies only to the one case whereas res judicata forecloses parties or privies in one case by what has been done in another case. 20

20 Although in its essence it is nothing more than a special and limited application of the doctrine of res judicata or former adjudication. 21

21 Gypsum Co. v. Columbia Casualty Co., 169 So. 532, 124 Fla. 633.) and what is known as the "law of the case," that is, the effect and conclusiveness of a former decision in the subsequent proceedings in the same case, has been generally put upon the ground of res judicata. 22

22 Petition v. Reader, App., 89 P. 2d 654; Williams Realty & Loan Co. v. Simmons, 3 S. E. 2d 580, 188 Ga. 184; Simmon v. Williams Realty & Loan Co., 194 S. E. 356, 185 Ga. 154; Dixon v. Reddle, 38 S. W. 2d 715, 238 Ky. 722; Darling v. Abbott, 191 N. W. 20, 221 Nich. 449; State v. Randazzo, 300 S. W. 755; 318 Mo. 761; In re Wecker's Estate, 243 N. W. 642, 644, 123 Neb. 504; Venus Shoe Corp. v. Hanover Shoe Store, 189 A. 352, 88 N. H. 478; In re Gould's Estate, 113 A. 552, 270 Pa. 535, 34 C. J. p. 748 note 97.

Such a decision, as the law of the case, is binding on the courts. 27

27 U. S. for use and benefit of John v. Morley Const. Co., 17 F. Supp. 378, modified on other grounds U. S. ex rel Johnson v. Morley Const. Co., 98 F. 2d 781, certiorari denied Maryland Casualty Co. v. U. S. for use and benefit of Harrington, 59 S. Ct. 244; Hamrick v. Stewart, 114 S. E. 723, 29 Ga. App. 220; Levine v. Levine, 252 P. 972, 121 Or. 44; Chase Nat. Bank of City of New York v. Carver, 2 N. Y. S. 2d 329, 166 Misc. 708; Grogan-Cocran Lumber Co. v. McWhorter, Civ. App. 15 S. W. 2d 126, error refused; McHenry v. Banker's Trust Co., Civ. App., 206 S. W. 560, error dismissed 41 Sup. Ct. 321, 255 U. S. 559, 65 L. Ed. 785; Moore v. Sacajawea Lumber & Shingle Co., 256 P. 331, 144 Wash. 38.) as well as on the parties. 28

28 Union Electric Light & Power Co. v. Snyder Estate Co., 15 F. Supp. 379; Roles v. Edwards, 176 S. E. 106, 49 Ga. App. 527; Hamrick v. Stewart, 114 S. E. 722, 29 Ga. App. 220; In re Wecke Estate, 243 N. W. 642, 645, 122 Neb. Levine v. Levine, 252 P. 972, 121 Or. 44; 15 C. J. p. 962 note 37 (a) and even though the decision was erroneous it cannot be availed of by the litigant prejudicially affected in a subsequent trial of the same cause, 29 (29 O'Neil Engineering Co. v. City of Lehigh, 182 P. 659, 75 Okl. 227).

District Court must follow law of its Circuit.

Bausch & Lomb Optical Co. v. Wahlgrenn, 1 F. Supp. 799, affirmed, C.C.A. Wahlgren v. Bausch & Lomb Optical Co., 68 F. 2d 660, certiorari denied 54 S. Ct. 774, 292 U. S. 639, 78 L. Ed. 1491, rehearing denied 54 S. Ct. 862, 292 U. S. 615, 78 L. Ed. 1491; Mobley v. J. A. Fischer Co., 49 F. 2d 920.

12. 21 C. J. S., Section 198, at page 348. Note 20.

In the federal courts a decision of the circuit court of appeals is binding on the district courts in its circuit for the propositions which it decided. 20

20 Edelmann & Co. v. Triple A. Specialty Co., 88 F. 2d 852, certiorari denied 57 S. Ct. 673, 300 U. S. 680, 81 L. Ed. 884; The M. M. O'Brien, 60 F. 2d 976; The Philip J. Kenny, D.C.N.J. 57 F. 2d 335; Cleaves v. Peterboro Basket Co., 54 F. 2d 101; First Trust Co. of Omaha v. Allen, 51 F. 2d 1069; affirmed 60 F. 2d 812, certiorari denied Doolittle v. Allen, 53 S. Ct. 315, 287 U. S. 671, 77 L. Ed. 578; Mobley v. J. A. Fischer Co., 49 F. 2d 920; Palmer v. Bender, 49 F. 2d 316; affirmed 57 F. 2d 32 certiorari granted 53 S. Ct. 79, 287 U. S. 586, 77 L. Ed. 512, affirmed 53 S. Ct. 225, 287 U. S. 551, 77 L. Ed. 489; Western Electric Co. v. Wallerstein, 48 F. 2d 268; D. L. Flack & Son v. West Virginia Coal Co., 46 F. 2d 177, affirmed 50 F. 2d 1075; In re King, 46 F. 2d 112; Hartford & New York Transp. Co. v. Rogers & Hubbard Co., 40 F. 2d 957, affirmed 47 F. 2d 189, certiorari denied Rogers & Hubbard v. Hartford & New York Transp. Co., 51 S. Ct. 483, 283 U. S. 835, 75 L. Ed. 1446; Lektophone Corp. v. Miller Bros. Co., 37 F. 2d 580, reversed on other grounds 51 S. Ct. 93, 282 U. S. 168, 75 L. Ed. 274 amended 51 S. Ct. 178; Sugarland Industries v. Bass, 36 F. 2d 375, reversed on other grounds Bass v. Sugarland Industries, 50 F. 2d 424; In re United Realty & Homebuilders' Corp., 27 F. 2d 138; U. S. ex rel. Hughes v. Gault, 13 F. 2d 225; In re Grossberg, 11 F. 2d 329; McNeely v. Town of Vidalia, 6 F. 2d 21, modifying and making injunction permanent, 6 F. 2d 19, and affirmed Town of Vidalia v. McNelly, 47 S. Ct. 758, 274 U. S. 676, 71 L. Ed. 1292; Morgan v. Tennessee Valley Authority, 28 F. Supp. 732; U. S. v. La Vine, 28 F. Supp. 113; U. S. v. Aluminum Co. of America, 26 F. Supp. 315; Sheldon v. Metro-Goldwyn Pictures Corp.,

26 F. Supp. 134; Bank of New York & Trust Co. v. U. S., 25 F. Supp. 314; Cookson v. Louis Marx & Co., 25 F. Supp. 615; In re James Butler Grocery Co., 22 F. Supp. 995; O. D. Jennings & Co. v. Maestri, 22 F. Supp. 980, affirmed 97 F. 2d 679; Diatel v. Gleason, 22 F. Supp. 355; In re Davis, 22 F. Supp. 2; English v. Bitgood, 21 F. Supp. 641; Baker v. U. S., 21 F. Supp. 577; Forrest v. Southern Ry. Co., 20 F. Supp. 851; Helmbright v. John A. Gebelein, Inc., 19 F. Supp. 621; Koppers Connecticut Coke Co. v. James McWilliams Blue Line, 18 F. 2d 865; certiorari denied James McWilliams Blue Line v. Koppers Coke Co., 58 S. Ct. 25, 302 U. S. 706, 82 L. Ed. 545; U. S. Ex rel Amato v. Commissioner of Immigration Ellis Island New York Harbor, 18 F. Supp. 480; Murphy v. Dunklin County, 17 F. Supp. 128; Campbell v. Lago Petroleum Corp., 16 F. Supp. 980; Remington Rand v. Lind, 16 F. Supp. 666; U. S. v. Hartford Accident & Indemnity Co., 15 F. Supp. 791; In re Lehrenkraus, 14 F. Supp. 682; In re Ruckman, 13 F. Supp. 992; In re Cheney Bros., 2 F. Supp. 605; G. B. R. Milling Co. v. Thomas, 11 F. Supp. 833, Neild Mfg. Corp. v. Hassett, 11 F. Supp. 642; In re Consolidation Coal Co., 11 F. Supp. 594, appeal dismissed, Daersam v. Consolidation Coal Co., 79 F. 2d 989; McNary v. Guaranty Trust Co. of New York, 6 F. Supp. 616; Lawrence v. Travelers Ins. Co., 6 F. Supp. 628; Irving Trust Co. v. Manufacturers Trust Co., 6 F. Supp. 185; Motor Improvements v. A. C. Spark Plug Co., 5 F. Supp. 712, reversed on other grounds, 80 F. 2d 385 certiorari denied A. C. Spark Plug Co. v. Motor Improvements, 56 S. Ct. 939, 298 U. S. 671, 80 L. Ed. 1194; In re Sollars, 5 F. Supp. 483; Mills Novelty Co. v. Bolan, 3 F. Supp. 968; affirmed Mills Novelty Co. v. O'Ryan, 68 F. 2d 1009, certiorari granted O'Ryan v. Mills Novelty Co., 54 S. Ct. 692, 292 U. S. 615, 78 L. Ed. 1474, reversed on other grounds 54 S. Ct. 779, 292 U. S. 609, 78 L. Ed.

1469; Bausch & Lomb Optical Co. v. Wahlegren, 1 F. Supp. 799, affirmed Wahlegren v. Bausch & Lomb Optical Co., 68 F. 2d 660, certiorari denied 54 S. Ct. 774, 292 U. S. 639, 78 L. Ed. 1491, rehearing denied 54 S. Ct. 862, 292 U. S. 615, 78 L. Ed. 1491; U. S. v. McGovern, 1 F. Supp. 568, affirmed 60 F. 2d 880, certiorari denied McGovern v. U. S. 53 S. Ct. 96, 287 U. S. 650, 77 L. Ed. 561; Radio Corporation of America v. Radio Engineering Laboratories, 1 F. Supp. 65, reversed on other grounds 66 F. 2d 768, certiorari granted 54 S. Ct. 373, 290 U. S. 624, 78 L. Ed. 544; Prudential Ins. Co. of America v. Herold, D. C. N. J. 247 F. 681; Jellison v. Krell Piano Co., 246 F. 509; U. S. v. River Spinning Co., 243 F. 759, affirmed 250 F. 586; Mark Seong v. U. S., 242 F. 496, 155 C.C.A. 272, Motifying Ex parte Chin Him, 227 F. 131.

13. The adjudication on the 2d Appeal No. 8027, C.C.A. 3d C. is the "Law of the Case" the propositions decided and the Evidence presented are substantially the very same.

5 Corpus Juris Secundum. APPEAL AND ERROR, p. 1267, Sec. 1821.

Former Decisions as the Law of the Case in General. (Head Note.)

a. Statement of Rule.

As a general rule, an adjudication on the first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.

It may be stated as a rule of general application that, where the evidence on a second or succeeding appeal is substantially the same as that on the first or preceding

appeal, all matters, questions, points, or issues adjudicated on the prior appeal are the laws of the case on all subsequent appeals and will not be reconsidered or readjudicated therein. 51

51 Messenger v. Anderson, 32 S. Ct. 739, 225 U. S. 436, 56 L. Ed. 1152; Claiborne-Reno Co. v. E. S. DuPont de Nemours & Co., 77 F. 2d 565; General Motors Acceptance Corp. v. Mid-West Chevrolet Co., 74 F. Ed. 386; Chesapeake & O. Ry. Co. v. Mears, 70 F. 2d 490, certiorari denied 55 S. Ct. 69; Jones v. Box Elder County, Utah, 67 F. 2d 900; Keeler v. Fred T. Ley, 7 Co., 65 F. 2d 499; Surick General Accident & Liability Ins. Co. v. O'Keefe, 64 F. 2d 768, certiorari denied 54 S. Ct. 49, 290 U. S. 630, 78 L. Ed. 548; Armour Fertilizer Works v. Sanders, 63 F. 2d 902, certiorari denied Sanders v. Fertilizer Works, 54 S. Ct. 345, 290 U. S. 623, 78 L. Ed. 543, affirmed 54 S. Ct. 677, 292 U. S. 190, 70 L. Ed. 1206, 91 A.L.R. 950, rehearing denied 54 S. Ct. 855, 292 U. S. 612, 78 L. Ed. 1472; Aetna Life Ins. Co. v. Wharton, 63 F. 2d 378, certiorari denied 53 S. Ct. 786, 289 U. S. 755, 77 L. Ed. 1500; Utah Power & Light Co. v. Woody, 62 F. 2d 613; Freeman v. Smith, 62 F. 2d 291; Northern Pac. Ry. Co. v. Van Dusen Harrington Co., 60 F. 2d 394; International Brotherhood of Electrical Workers Local No. 134 v. Western Union Telegraph Co., 46 F. 2d 736, certiorari denied 52 S. Ct. 13, 284 U. S. 630, 76 L. Ed. 536; National Brake & Electric Co. v. Christensen, 38 F. 2d 721, certiorari denied 51 S. Ct. 36, 282 U. S. 86, 75 L. Ed. 764; Minneapolis Steel & Machinery Co. v. Federal Surety Co., 34 F. 2d 270, affirmed, 22 F. 2d 712; Dodd v. Union Indemnity Co., 32 F. 2d 512, certiorari denied 50 S. Ct. 33, 74 L. Ed. 631; Illinois Cent. Ry. Co. v. Crail, 31 F. 2d 111; affirmed Crail v. Illinois Cent. R. Co., 21 Fed. 836, certiorari granted Illinois Cent. R. Co. v. Crail, 49 S. Ct.

483, 279 U. S. 833, 73 L. Ed. 982, reversed on other grounds, 50 S. Ct. 180, 281 U. S. 57, 74 L. Ed. 699, 67 A.L.R. 1423; Pennsylvania Mining Co. v. United Mine Workers of America, 28 F. 2d 851, certiorari denied 49 S. Ct. 263, 279 U. S. 841, 73 L. Ed. 987; City and County of Denver v. Denver Tramway Corp., 23 F. 2d 287, certiorari denied, 49 S. Ct. 20, 278 U. S. 616; 73 L. Ed. 539; L. P. Larson, Jr., Co. v. William Wrigley, Jr., Co., 20 F. 2d 830, modifying William Wrigley, Jr., Co. v. L. P. Larson, Jr., Co., 5 F. 2d 731, and certiorari denied 48 S. Ct. 207, 276 U. S. 616; 72 L. Ed. 733, certiorari granted L. P. Larson, Jr., Co. v. William Wrigley, Jr., Co., 48 S. Ct. 157, 275 U. S. 521, 72 L. Ed. 404, motion denied 48 S. Ct. 435, 73 L. Ed. 1018, and reversed in part on other grounds 48 S. Ct. 449, 277 U. S. 97, 72 L. Ed. 800; City of Seattle v. Puget Sound Power & Light Co., 15 F. 2d 794, certiorari denied 47 S. Ct. 456, 273 U. S. 752, 71 L. Ed. 874, and Puget Sound Power & Light Co. v. City of Seattle, 47 S. Ct. 458, 273 U. S. 753, 71 L. Ed. 874; Couteau Trust Co. v. Massachusetts Bonding & Insurance Co., 12 F. 2d 136; Dickinson v. O. & W. Thum Co., 8 F. 570; In re Paramount Publix Corp., 10 F. Supp. 504; Meyer & Chapman State Bank v. First Nat. Bank, 291 F. 42; First Nat. Bank v. Old Dominion Trust Co., 284 F. 128; Canal-Commercial Trust & Savings Bank v. Bank of Plant City, 278 F. 178; Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 277 F. 171, affirming 276 F. 600, 613, and certiorari denied U. S. Rubber Reclaiming Works v. Philadelphia Rubber Works Co., 42 S. Ct. 187, 257 U. S. 660, 66 L. Ed. 422; Browne v. Thorn, 272 F. 950, certiorari granted 41 S. Ct. 625, 256 U. S. 689, 65 L. Ed. 1172, and affirmed 43 S. Ct. 36, 260 U. S. 137, 67 L. Ed. 171; Keith v. Kilmer, 272 F. 643, certiorari denied Kilmer v. Keith, 42 S. Ct. 51, 257 U. S. 639, 66 L. Ed. 410; Cogswell v. Drennen, 172 F. 289, Petition DISMISSED

Tilton v. Drennen, 42 S. Ct. 53, 257 U. S. 651, 66 L. Ed. 417, rehearing granted 42 S. Ct. 168, 257 U. S. 631, 66 L. Ed. 406, certiorari denied 42 S. Ct. 169, 259 U. S. 657, 66 L. Ed. 428, and appeal dismissed 43 S. Ct. 358, 261 U. S. 424, 67 L. Ed. 823, and reversed on other grounds, 43 S. Ct. 704, 262 U. S. 735, 67 L. Ed. 1206; Rainier Brewing Co. v. Great Northern Pac. S. S. Co., 270 F. 94, affirmed 42 S. Ct. 436, 259 U. S. 150, 66 L. Ed. 868; Chapin-Sacks Mfg. Co. v. Hendler Creamery Co., 267 F. 180, Certiorari denied 41 S. Ct. 62, 254 U. S. 648, 65 L. Ed. 451; Bodkin v. Edwards, 265 F. 621, affirming Edwards v. Bodkin, 267, F. 1004, and affirmed 41 S. Ct. 268, 255 U. S. 221, 65 L. Ed. 595; F. H. Orcutt & Son Co. v. National Trust & Credit Co., 265 F. 267, certiorari denied 40 S. Ct. 584, 253 U. S. 491, 64 L. Ed. 1028. (There are 18 columns of cases cited hereunder. I consider the above cases sufficient in law and therefore I proceed no further with the copying and entering of the remaining cases so cited by the authority. Please see them there under the note cited above. N. J. Curtis, plaintiff-appellant.)

14. 5 C. J. S. p. 1499, Sec. 1964. (Head Note.)

a. In General. The decision of a reviewing court becomes the law of the case as to all matters properly within the scope thereof and controls in all subsequent trials or proceedings.

It is a general rule that the decision of an appellate court is the law of the case in further proceedings in the cause in the trial court. 61

61 City of New York Ins. Co. v. American Co. of Arkansas, 42 S. W. 2d 757, 184 Ark. 426; American Co. of Arkansas v. Wheeler, 36 S. W. 2d 965, 185 Ark. 550; Arkansas

Fuel Oil Co. v. State, 22 S. W. 2d 556, 180 Ark. 765, (several other cases follow here); Shields v. Rancho Buena Ventura, 203 P. 577, 187 Cal. 144; . . .; Greely Loveland Irr. Co. v. Handy Ditch Co., 240 P. 270, 77 Colo. 487; Gray v. Mossman, 99 A. 1062, 91 Conn. 430; Firemen's Ins. Co. v. Oliver, 167 S. E. 99, 176 Ga. 80, reversing 162 S. E. 636; . . .; Vinyard v. North Side Canal Co., 274 P. 109, 47 Idaho 272, appeal dismissed and certiorari denied 50 S. Ct. 67, 280 U. S. 520, 74 L. Ed. 589; . . .; Numerous other cases follow here too many to copy and enter them. See them under note 61.)

And in all subsequent stages of the action or proceeding, 62

62 Morris & Co. v. Alexander & Co., 22 S. W. 2d 552, 180 Ark. 725; Deacon v. Bryans, 298 P. 30, 212 Cal. 87; Oglethorpe University v. City of Atlantic, 178 S. E. 156, appeal dismissed 55 S. Ct. 642; Trenton v. Johnson, 240 P. 859, 41 Idaho 583; Palazzolo v. Sackelt, 236 N. W. 786, 254 Mich. 287; Denny v. Guyton, 57 S. W. 2d 415, 321 Mo. 1115, certiorari denied Guyton v. Denny, 53 S. Ct. 657, 289 U. S. 738; certiorari denied Guyton v. Denny, 53 S. Ct. 657, 289 U. S. 738, 77 L. Ed. 1486; McGraw v. Southern Ry. Co., 184 S. E. 31, 209 N. C. 432; Amerada Petroleum Corp. v. Elliff, 41 P. 2d 85; Rugenstein v. Ottenheemer, 152 P. 215, 78 Or. 371, Ann Case 1917 E953; Public Theatres Corp. v. Carpenter, 56 S. W. 2d 248; Perkins v. Vermont Hydro Electric Corp., 177 A. 631; Kaufman v. Catzen, 130 S. E. 292, 100 W. Va. 79; 4 C. J. p. 1214 note 84).

As in a subsequent suit for the same cause of action, 63.

63 Tally v. Ganahl, 90 P. 1049, 151 Cal. 418) Or on a subsequent appeal in accordance with the rule laid down supra in sections 1821-1834.

24 C. J. S. p. 690, Section 1840.

FORMER DECISION AS LAW OF CASE. (Head Note.)

15. Generally the determination of the appellate court as to all questions within the record which are or might have been raised and decided will be the law of that case in subsequent proceedings in the same case.

It is a general rule that the determination of an appellate court as to all questions within the record which are or might have been raised and decided will be the law of that case in subsequent proceedings in the case, 22.

22 Marron v. U. S., 182 F. 2d 218, certiorari granted 47 S. Ct. 574, 274 U. S. 727, 71 L. Ed. 1313, affirmed 48 S. Ct. 74, 275 U. S. 192, 72 L. Ed. 231 motion denied 48 S. Ct. 206, 72 L. Ed. 1016 (Numerous other cases cited hereunder. See them there under note 22.) Marron v. U. S., supra: Head Note 1. Criminal Law key 1180, 1193.—Decision by appellate court becomes Law of Case on second trial and appeal.

Where the evidence is the same and the charge identical, a final decision by an appellate court establishes the law of the case, which governs on a second trial and on a second appeal.

(1) (at page 219 1st col.) Where the evidence is the same, and the charge identical, a final decision on appeal establishes the rule, or law of the case, which will govern the second trial and the former decision made by this court will be binding no, . . . We conclude at once that the former decision on the same point, made under the same charge on the same evidence forecloses argument.

16. CRIMINAL LAW. 24 C. J. S. p. 690, Sec. 1840.

FORMER DECISION AS LAW OF CASE.

Williams v. State, supra Bricken, Presiding Judge.

This is a companion case to that of Son, alias Spider, Williams Same Appellant v. State (1 Div. 194) 171 So. 386, appeal from Mobile circuit court.

We are informed by counsel in briefs, that the prosecution grew out of the same transaction, and while the offenses charged are different the point of decision and respective insistences of parties are in every respect identical; hence a decision in one case would of necessity be controlling in the other.

This court has considered and determined the companion case, wherein appellant appealed from a judgment of conviction for the offense of murder in the second degree (1 Div. 194), supra.

It appears that every point of decision here presented and insisted upon by counsel for appellant has been passed upon and decided in said companion case, hence, there is no necessity for repetition in the instant case.

In concluding the opinion aforesaid this court stated: "We have carefully considered this record and every question raised and presented. . . ."

17. American Equitable Assur. Co. v. Baily, supra. Court of Appeals of Alabama. Samford, Judge.

This is a companion case to that of American Equitable Assurance Company reported in 221 Ala. 28, 128 So. 225, . . .

By that decision we are bound and we do not go into a consideration of those questions.

18. Sheffield v. Tab et al. Supreme Court of Georgia.

PER CURIAM.

This is a companion case of Sheffield v. Sheffield, 173 S. E. 125, this day decided. The two cases involve the same question and were tried together, but separate and identical verdicts were rendered, and the grounds of the motion for new trial are identical. This case is therefore controlled by the rulings made in the case of Sheffield v. Sheffield.

19. 2 R. C. L. p. 223. APPEAL AND ERROR.

SUCCESSIVE APPEALS.—"LAW OF THE CASE".
Sec. 187. In General.

It may be stated generally that a court of review is precluded from agitating questions which were propounded, considered, and decided on a previous review; the decisions agree that, as a general rule, when an appellate court passes upon a question and remands the cause for further proceedings, the question (s) there settled become the "law of the case" upon a subsequent appeal, 10.

10 Mutual Reserve Fund Life Assoc. v. Ferrenbach, 144 Fed. 342, 75 C.C.A. 304, 7 L.R.A. (N. S.) 1163; Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Montgovery v. Gilmer, 33 Ala. 116, 70 Am. Dec. 562; Fortenberry v. Frazer, 5 Ark. 200, 39 Am. Dec. 373; Johnson v. San Francisco Sav. Union, 75 Cal. 134, 16 Pac. 753, numerous other cases are cited thereunder. See them there under note 10. The foregoing authority proceeds further than this. See it there as reported.

20. C. J. S. p. 1275, Sec. 1823. WHERE CASE IS REMANDED. (Head Note.)

After the case is remanded, the court on a second appeal

will consider only those questions arising subsequently to the remand or which were not adjudicated in the former determination.

In accordance with the general rule stated in Sec. 1821 where, after a definite determination the court has remanded the cause for further action below, it will refuse to examine questions other than those arising subsequently to such determination and remand, or other than the propriety of the compliance with its mandate, 76.

76 Steinfeld v. Zeckendorf, 36 S. Ct. 14, 239 U. S. 26, 60 L. Ed. 125, affirming Zeckendorf v. Steinfeld, 138 P. 1044, 15 Ariz. 335; Jones v. Box Elder County, Utah, 67 F. 2d 900; American Surety Co. of New York v. Greek Catholic Union, 51 F. 2d 1050, certiorari granted 52 S. Ct. 41, 284 U. S. 608, 76 L. Ed. 520, and reversed on other grounds 52 S. Ct. 235, 284 U. S. 563, 76 L. Ed. 490, amended 52 S. Ct. 392, 285 U. S. 526, 76 L. Ed. 923; Lederer v. Real Estate Title Ins. & Trust Co. of Philadelphia, 273 F. 933 (numerous other cases from State Courts follow here, too many to copy them and enter them here. See them in the C. J. S. on p. 1276).

And if the court below has proceeded in substantial conformity to the directions of the appellate court, its action will not be questioned on a second appeal (citations). However, . . . if the lower court misconstrues the degree of the appellate court and does not give full effect to its mandate, 79 (79 Continental Commercial Trust Savings Bank v. North Platte Valley Ser. Co., 237 F. 188, 150 C. C. A. 334; 4 C. J. p. 1099 note 4) a new appeal is an appropriate remedy.

COMMERCIAL UNION OF AMERICA, INC. v. ANGLO-SOUTH AMERICAN BANK, LTD., C.C.A. 2d. 1925, 10 F. 2d. 937.

1. Courts Key 99 (2)—Order of judge denying motion to dismiss complaint became the law of the case and should be so treated by any other judges sitting in same case in that court.

Where District Judge denied motion to dismiss complaint, his decision was the law of the case as established in District Court, and should have been so treated by any other judge sitting in same case in that court; hence later order of different judge dismissing complaint was improper.

2. Courts Key 481—Judges of co-ordinate jurisdiction, sitting in same court and case, should not overrule decisions of each other.

Judges of co-ordinate jurisdiction, sitting in the same court and in the same case, should not overrule the decisions of each other.

In Error to the District Court of the United States for the Southern District of New York.

Action by the Commercial Union of America, Inc., against the Anglo-South American Bank, Limited. Judgment denying application to amend complaint, and granting motion to dismiss complaint, and plaintiff brings error. Reversed, with directions. . . .

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The plaintiff is a corporation organized and existing under the laws of the State of New York. The defendant was and is a corporation organized and existing under the laws of the United Kingdom of Great Britain. It is a foreign bank transacting business within the State of New York under a license from the state superintendent of banks.

The action was brought to recover damages in the sum of $21,042.97, with interest and costs, for the alleged breach by

defendant of a contract expressed in a commercial credit issued by the defendant on October 22, 1920, for the sum of $44,800. . . .

It appears that, prior to the order dismissing the complaint on the ground of its insufficiency, which order, as stated, was made on November 24, 1924, a similar motion to dismiss for like reason had been made before Judge Mack, sitting in the District Court, and he denied the motion by an order made on February 14, 1922. It was thereby decided that the complaint was sufficient; the motion to dismiss being equivalent to a demurrer.

The first order is in the record, which the attorneys on both sides stipulate is a true transcript of the record in the action; and the facts are fully recited in the agreed "statement" prepared in accordance with Rule 26 of the District Court Rules. The situation presented, therefore, is this: That after one judge sitting in the case had decided the complaint to be sufficient, another judge sitting in the same court decided it was insufficient and dismissed it.

We are not aware that it has ever before happened that in the Southern District of New York, or in any district within this circuit, one judge has in effect undertaken to set aside or ignore an order made by another judge of co-ordinate jurisdiction in the same suit. It is contended by the plaintiff that the order first made, sustaining the sufficiency of the complaint, rendered the question res judicata as between the parties, and was the law of the case, binding upon the other judges of the court.

In Roberts & Co. v. Buckley, 145 N. Y. 215, 229, 39 N. E. 966, 970, Judge O'Brien, writing for the New York Court of Appeals, said:

"But it is said that this court in the Second division took a different view of the effect of the inventory in deciding the former appeal, and that we are bound by that decision.

If the facts then and now are identical, it is our duty to follow the former decision, even though convinced, if the case was res nova, that our brethren of the Second division took an erroneous view of the law. It is necessary to adhere to this principle if there is ever to be an end to litigation. It is important, of course, that private controversies should be determined in the court of last resort according to law and justice; but the infirmities of human judgment are such that different tribunals will not always take the same view of the question. When, however, the question has been once decided in this court, or in the Second division, with co-ordinate powers, the same parties, in the same case, upon the same facts, cannot be permitted to reopen the discussion without great detriment to the public interest and destroying that respect for the decisions of courts which it is important should it be maintained. (Cluff v. Day, 141 N. Y. 580 (36 N. E. 182); Mygatt v. Coe, 142 N. Y. (36 N. E. 870); Moore v. Simmons, 133 N. Y. 695 (31 N. E. 513)."

And in Matter of Laudy, 161 N. Y. 429, 434, 435, 55 N. E. 914, 915, Judge Vann, writing for the same court, said:

"The principle established in all jurisdictions is that so long as the facts remain the same, the rule of law once held by the court of last resort remains the rule throughout the subsequent history of the cause, in all its stages, except under extraordinary circumstances, which do not exist in this case. 2 Van Fleet's Former Adjudication, 1302, and cases cited. Where the law of a case was determined after full argument and consideration, by the Second Division of this court, and upon a second appeal substantially the same facts appeared, we refused to consider the questions of law and held the parties concluded by the former decision. Cluff v. Day, 141 N. Y. 580 (36 N. E. 182). That there is a question of fact in this case is res judicata. The rule of res judicata controls the parties, while that of stare decisis guides the courts."

In Appleton v. Smith, 1 Fed. Cas. 1075, Fed. Cas. No. 498, Justice Miller (of the Supreme Court), sitting as a Circuit Justice in the District of Arkansas, in 1870, had before him a motion to quash an attachment levied on goods. He denied the motion, and in doing so said:

"Upon looking into the record of the case, I find that the same motion, based upon the same legal proposition, was made at the last term of the court, and was overruled by the last district judge, who at that time held the court. I have repeatedly decided in this circuit, since I was first assigned to it, that I would not sit in review of the judgments and orders of the court, made by the District Judges in my absence. Where, as in the present case, the motion is made on the same grounds, and with no new state of pleadings or facts, it is nothing more than an appeal from one judge of the same court to another, and though it is my province in the Supreme Court to hear and determine such appeals, I have in this court no such prerogative.

The district judge would have the same right to review my judgments and orders here as I would have in regard to his. It would be in the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate in his absence, and might lead to unseemly struggles to obtain a hearing before one judge in preference to the other. I have also held, and have prescribed it for myself as a rule of conduct, that the presence of the District Judge, and his consent to a review of his decision, will not vary the course to be pursued."

In United States v. Biebusch, 1 F. 213, 1 McCrary 43, Judge McCrary sitting as a Circuit Judge in 1880, said:

"In this case and one other I have at this time heard, with the District Judge, motions for new trials in cases tried before him when holding alone the Circuit Court. I have done so at his request, and only for the purpose of advising

with and assisting him. It is well settled in this circuit that the rulings of the District Judge while holding the Circuit Court are not subject to be reviewed in the same court, either by the Circuit Judge or the Circuit Justice. I make this announcement so that it may be understood that I am not to be expected, as a rule, to entertain motions for new trials in cases tried in my absence by the District Judge, and that I will only sit with the District Judge in hearing such matters when he desires and requests it. It is not enough that he does not object or consent."

In Cole Silver Mining Co. v. Virginia & Gold Hill Water Co., 6 Fed. Cas. No. 2, 990, Mr. Justice Field (of the Supreme Court), sitting in the Circuit Court, said:

"II. The injunction, although preventive in form, is undoubtedly mandatory in fact. It was intended to be so by the Circuit Judge who granted it, and the objection which is now urged for its dissolution was presented to him, and was fully considered. I could not with propriety reconsider his decision, even if I differed from him in opinion. The Circuit Judge possesses, as already stated, equal authority with myself in the circuit and it would lead to unseemly conflicts, if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case."

In Ogley v. Attrill, 14 F. 214, Judge Pardee, sitting in the Circuit Court for the Eastern District of Louisiana, in 1882, was asked to set aside a substituted service of process. He said:

"I have examined the record, and I find that this question has been passed upon and adjudicated by the District Judge sitting in this court in the early stage of this case. 12 Fed. Rep. 227. This decision is not open for review to any other judge sitting in this court in the same case."

In Reynolds v. Iron Silver Mining Co., 33 Fed. Rep. 354,

Justice Brewer (of the Supreme Court), sitting in the Circuit Court in Colorado in 1888, was asked to dissolve an injunction which had been granted by another judge of the court. He declined to do it, and, after referring with approval to what was said by Justice Miller in Appleton v. Smith, supra, and by Judge McCrary in United States v. Biebusch, supra, went on to say:

"You all know, at least those who have been familiar with the jurisprudence of the State of New York, how many unseemly struggles there have been, as Justice Miller refers to, to get a case now before one judge, and then before another. Under their peculiar system, you get an order before one judge; the beaten party goes to another judge, gets an order staying proceedings, and sets down a motion before a third to vacate the order, and one never knows when the litigation is at an end, or where it is to continue; whereas, if it is all continued before the same judge from the commencement to the close, there is a consistency in the rulings, if nothing else; and I think that the orderly administration of justice requires, and justice itself will in the long run and the general average be best secured, if litigation commenced before one judge continues before him until it shall be taken to an appellate tribunal."

In Wakelee v. Davis, 44 F. 532, Judge Coxe, sitting in the Circuit Court for the Southern District of New York in 1891, in a case which had been twice before the court on demurrer, said:

"The propositions of law presented are the same now as on demurrer. Some testimony has been taken pro and con, but, upon all important questions, it is substantially conceded that the legal aspects of the cause remain unchanged. It is true that in deciding the issues presented by the demurrer the court spoke through another judge, but the law there enunciated is not merely the individual opinion of the

judge who presided; it is the law of this court, to be followed, upon similar facts, until a different rule is laid down by the Supreme Court. A re-examination and discussion of the question involved is, therefore, unnecessary, for the reason that the court is constrained to follow its former decision."

In Shreve v. Cheesman, 69 F. 785, 790, 16 C.C.A. 413, 418, Judge Sanborn, writing for the Circuit Court of Appeals in the Eighth Circuit, in 1895, said:

"It is a principle of general jurisprudence that courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action. This principle is nowhere more firmly established or more implicitly followed than in the Circuit Courts of the United States. A deliberate decision of a question of law by one of these courts is generally treated as a controlling precedent in every federal Circuit Court in the Union, until it is reversed or modified by an appellate court. Striking illustrations of this principle will be found in Culcanite Co. v. Willis, 1 Flip. 389, 393, Fed. Cas. No. 5,606, in which Judge Emmons said of these courts: 'They constitute a single system; and when one court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demand it should be followed until modified by the appellate court. * * *So great, however, is the importance I attach to uniformity of decision by courts of co-ordinate jurisdiction, that I feel constrained to adopt the rule thus established in the several districts in which these cases arose. It seems more important that the rule should be uniform and certain than that it should be consistent with principle'; Welle v. Navigation Co. (C. C.), 15 F. 561, 570; Reed v. Railroad Co. (C. C.), 21 F. 283; American Wood Paper Co. v. Fiber Disintegrating

Co., 3 Fish. Pat. Cas. 362, Fed. Cas. No. 320; Goodyear v. Berry, 3 Fis. Pat. Cas. 439, Fed. Cas. No. 5,556; Machinery Co. v. Knox (C. C.), 39 F. 702. Nor has it been thought less vital to a wise administration of justice in the federal courts that the various judges who sit in the same court should not attempt to overrule the decisions of each other, especially upon questions involving rules of propriety or of practice, except for the most cogent reasons."

In Taylor v. Decatur Co., 113 F. 449, District Judge Toulmin, sitting in the Circuit Court for the Northern District of Alabama, in 1901, said:

"Such of the demurrers as are filed to the original bill, and which were heretofore considered and overruled by Judge Swayne, then presiding in this court, are not passed on by me further than pro forma to overrule them, as having been ruled on by this court. One judge will not review the rulings of another in the same court."

In Plattner Implement Co. v. International Harvester Co. of America, 133 F. 376, 66 C.C.A. 438, a general demurrer was interposed to an answer and was sustained by the resident District Judge. The defendant thereupon filed an amended answer, and the plaintiff filed a reply to that answer. There was a trial before a jury and the District Judge of another district, who was temporarily holding the court. The trial judge directed a judgment for the defendant upon a defense, although the resident judge had previously sustained the demurrer to it. Judge Sanborn, writing for the Circuit Court of Appeals for the Eighth Circuit, in considering the action of the trial judge, after referring to the rule laid down in Shreve v. Cheesman, supra, and referring to it as a "rule of comity and of necessity," said:

"But the rule itself, and a careful observance of it, are essential to the prevention of unseemly conflicts, to the speedy conclusion of litigation, and to the respectable ad-

ministration of the law, especially in the national courts, where many judges are qualified to sit at the trials, and are frequently called upon to act in the same cases. It is unavoidable that the opinions of several judges upon the many doubtful questions which are constantly arising should sometimes differ, and a rule of practice which would permit one judge to sustain a demurrer to a complaint, another of co-ordinate jurisdiction to overrule it and to try the case upon the theory that the pleading was sufficient, and the former to then arrest the judgment, upon the ground that his decision upon the demurrer was right, would be intolerable. It has long been almost universally observed."

In Presidio Mining Co. v. Overton, 261 F. 933, decided by the Circuit Court of Appeals in the Ninth Circuit, it quoted approvingly the remarks of Justice Field in Cole Silver Mining Co. v. Virginia & Gold Hill Water Co., supra, already set forth in this opinion.

We have at some length set forth the rulings of the federal courts on the effect of a decision made by a trial judge upon the right of a judge sitting subsequently in the same court and in the same case to overrule the decision of the first judge on the same matter. We have done so because the question raised is important, and has to do with the dignified and orderly procedure of the courts, and is a departure from what has been regarded heretofore in this and in the other circuits as improper and not to be countenanced.

The learned judge who first passed on the sufficiency of the complaint, and held it to be sufficient, denying the motion to dismiss, filed no opinion; and the learned judge who subsequently sat in the case, in the same court, held the same complaint insufficient and dismissed it, and also wrote no opinion, but in denying the motion to amend the complaint to the complaint, if allowed, would not cure the infirmity.

Old Colony Trust Co. v. L. T. & T. Co., 297 F. 152. Motion denied."

(1, 2). It appears, therefore, that in dismissing the complaint, he thought the decision of this court in the Old Colony Trust Co. Case, and handed down after Judge Mack had made the original order sustaining the sufficiency of the complaint, was erroneous in law, ought to be disregarded by him, and required the dismissal of the action. In so holding we think he made a serious mistake, quite irrespective of whether or not the Old Colony Trust Co. Case was correctly construed by him. The counsel for the plaintiff in error insists that that case is plainly distinguishable from this in its facts, and is not at all governed by it. We shall not pass upon that question at this time, but content ourselves with holding that the decision made by Judge Mack was the law of the case as established in the District Court, and should have been so treated by any other judge sitting in the same case in that court. Judges of co-ordinate jurisdiction, sitting in the same court and in the same case, should not overrule the decisions of each other.

For that reason and that reason only, the judgment is reversed, and the District Court is directed to reinstate the action and grant the motion to amend the complaint.

HYDE AND SCHNEIDER v. UNITED STATES, 225 U. S. 347.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

(1) In this case the defendant applied for a writ of certiorari and the Attorney General assented to granting it on the ground that the determination of the case depends upon

the principles of law governing conspiracy and it is of vital importance to the United States, as well as its citizens, to have those principles settled by this court.

(2) While under the ancient rule of conspiracy the gist was the conspiracy itself and the crime was complete without any overt act, Sec. 5440, Rev. Stat. prescribes as necessary to constitute an offense under it not only the unlawful conspiracy but also an overt act to effect the object by at least one of the conspirators.

(3) Quaere as to the extent of agency between persons conspiring in violation of Sec. 5440, Rev. Stat.

(4) There may be a constructive presence in a State, distinct from personal presence, by which a crime committed in another State may be consummated, and render the person consummating it punishable at that place.

(5) In construing criminal laws, courts must not be in too great solicitude for the criminal to give him immunity because of the difficulty in convicting or detecting him.

(6) In determining the place of trial there is no oppression in taking the conspirators to the place where the overt act was performed rather than compelling the victims and witnesses to go to the place where the conspiracy was formed.

(7) The size of our country has not become too great for the effective administration of criminal justice.

(8) Where a continuing offense is committed in more than one district, the Sixth Amendment does not preclude a trial

in any of those districts. Armour Packing Co. v. United States, 209 U. S. 56.

(9) Overt acts performed in one district by one of the parties who had conspired in another district in violation of Sec. 5440, Rev. Stat., give jurisdiction to the court in the district where the overt acts are performed as to all the conspirators. Brown v. Elliott, p. 392, post (in the report); United States v. Kissel, 218 U. S. 601, followed to the effect that a conspiracy under 5440, Rev. Stat. may be continuing one, and that the offense is not barred on the expiration of the period from the date of the conspiracy itself.

(10) The fact that one of the conspirators was the servant of another conspirator does not preclude there being a conspiracy between them, and, until there is an affirmative withdrawal from the conspiracy by the servant, his acts bind his employer and co-conspirator so far as preventing the statute of limitations from running.

(11) Until a conspirator affirmatively withdraws from a continuing conspiracy there is conscious offending that prevents the statute from running.

(12), (13), et seq. left out. See them in the Reported Case.

Mr. Justice McKenna delivered the opinion of the court. At p. 355.

The case is here on certiorari.

The Attorney General assented to the granting of the writ, he saying that "the determination of this case depends upon the principles of law governing conspiracies," and that in view of the decisions of the lower courts and of the numerous prosecutions under the conspiracy statute, "it was of vital importance to the United States, as well as to its citizens, that these principles be definitely settled by this court."

The petitioners asked the court to review the case for the purpose of having it decide certain questions of law which they characterized as "important and fundamental" one of which, counsel says, granting the writ took out of the case. Of those remaining one is "as to the effect of an overt act in giving jurisdiction in an indictment for conspiracy under section 5440," and the other is "as to the effect of overt acts by some of the accused in depriving the petitioners of the benefit of the statute of limitations."....

First, as to the overt acts in giving jurisdiction:

It will be observed that the indictment charges that the conspiracy was formed in the District of Columbia and that certain of the overt acts were performed there and others in California.

"If these defendants got together in California and planned to defraud the United States out of its lands by the means charged in the indictment, and in pursuance of that plan sent Dimond here to get the titles from the Government, they were acting within the District of Columbia as much as if they had come and done the thing themselves." And subsequently the United States Attorney assented to the proposition that the Government could not prevail except on the theory that it was sufficient to show an overt act in the District of Columbia, and the court said "that if that theory was wrong, of course they failed."

The question, therefore, is presented as to the venue in conspiracy cases, whether it must be at the place where the conspiracy is entered into or whether it may be at the place where the overt act is performed, the Sixth Amendment of the Constitution of the United States requiring all criminal prosecutions to be in the "district wherein the crime shall have been committed."

The crime of conspiracy is defined by Sec. 5440 of the Revised Statutes as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court."

It is contended by the defendants that the conspiracy—the union in an unlawful purpose—constitutes the crime and that the requirement of an overt act does not give the offense criminal quality or extent, but that the provision of the statute in regard to such act merely affords an opportunity to withdraw from the design without incurring its criminality (called in the cases a locus penitentiae).

But we think the argument insists too exactly on the ancient law of conspiracy, and does not give effect to the change made in it by §5440, supra. It is true that the conspiracy, the unlawful combination, has been said to be the crime, and that at common law it was not necessary to aver or prove an overt act, but Sec. 5440 has gone beyond such rigid abstraction and prescribes, as necessary to the offense, not only the unlawful conspiracy, but that one or more of the parties must do an "act to effect" its object, and provides that when such act is done "all the parties to such conspiracy" become liable. Interpreting the provision, it was decided in Hyde v. Shine, 199 U. S. 62, 67, that an overt act is necessary to complete the offense. And so it was said in United States v. Hirsch, 100 U. S. 33, recognizing that while the combination of minds in an unlawful purpose was the foundation of the offense, an overt act was necessary to complete it. It seems like a contradiction to say that a thing is necessary to complete another thing and yet that other thing is complete without it. It seems like a paradox

to say that anything, to quote the Solicitor General, "can be a crime of which no court can take cognizance." The conspiracy, therefore, cannot alone constitute the offense. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it cognizable then by the judicial tribunals, such tribunals only then acquiring jurisdiction.

A question may be raised as to the extent of the agency between conspirators, but we need not enter into that broad inquiry. As far as the case at bar is concerned, may be admitted that the act must have the conspiracy in view and have some power to effect it. In the present case the field of operation and its consummation were to be and were in the States of California and Oregon and in the District of Columbia, where the General Land Office is situated. The action of the latter was to be induced or influenced, and this might be through deception, it might be through fraud, or it might be through innocent agents and acts of themselves having no illegality, but effectually causing and moving official action to the consummation of the end designed and contemplated. Overt acts of all these kinds are charged. The bribery and deception of the officers, the intervention of attorneys and the seemingly harmless mailing of information and directions all are charged and all had some relation to the scheme devised and were steps to its accomplishment. The powers of the Land Office were necessarily to be invoked and proceedings therein instituted and prosecuted by acts innocent indeed of themselves, taking only criminal taint from the purpose for which they were done. Indeed, is not this so of acts done in the execution of any crime? Discharging a loaded pistol at a target is an innocent pastime, discharging a loaded pistol at a human being with felonious

intent takes a quality from such intent and may constitute murder.

If the unlawful combination and the overt act constitute the offense, as stated in Hyde v. Shine, marking its beginning and its execution or a step to its execution, Sec. 731 of the Revised Statute must be applied. That section provides that "when any offense against the United States is begun in one judicial district and completed in another it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein." This provision takes an emphasis of signification from the fact that it was originally a part of the same section of the statute which defined conspiracy—that is Sec. 30 of the Act of March 2, 1867, 14 Stat. 484, c. 169. Nor has the provision lost the strength of meaning derived from such association by its subsequent separation, for it is provided in Sec. 5600 of the Revised Statute that "the arrangement and classification of the several sections of the revision have been made for the more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed."

Section 731 was applied in re Palliser (136 U. S. 257) to the offense of unlawfully using the mails. It was decided that an offense committed by mailing a letter was continued in the place where the letter was received, and triable in the District Court of the United States having jurisdiction in such place. The case was cited in Benson v. Henkel, 198 U. S. 1, 15, which was concerned with extradition proceedings against one charged with the crime of bribery, alleged to have been committed by mailing a letter in the State of California, directed to certain officers of the General Land

Office in the District of Columbia. It was objected to the removal of the defendant to the District of Columbia for trial that the crime was committed, if at all, in California. The contention was held untenable under the ruling in In re Palliser. The strong expression of counsel for the defendants may, therefore, be turned from derision of to the support of the view, that crime, even conspiracy, may be carried from one place to another in the "mail pouches." And we may ask in passing, may not a conspiracy be formed through the mails constituted by letters sent by persons living in different States? And, if so formed, we may further ask, to which State would the conspiracy be assigned? In such case must the law come forward with some presumption or fiction, if you please, give locality to an union of minds between men who were never at the same place at the same time? The statute cuts through such puzzles and makes the act of a conspirator, which necessarily has a definite place without the aid of presumption or fiction, the legal inception of guilt inculcating all and subjecting all to punishment.

In re Palliser was also applied in Burton v. United States, 202 U. S. 344, in which it was held that there was jurisdiction in Missouri of a criminal charge against Burton for agreeing in that State to receive prohibited compensation for certain services to be rendered by him while he was a United States Senator, the offer being personally present in the State. The court said through Mr. Justice Harlan (p. 387): "The constitutional requirement is that the crime shall be tried in the State and District where committed, not necessarily in the State or district where the party committing it happened to be at the time. This distinction was brought out and recognized in Palliser's case, 136 U. S. 257."

And, after stating that the agreement between the parties was completed at the time of the acceptance of Burton's

offer at St. Louis, he added: "Then the offense was committed, and it was committed at St. Louis, notwithstanding the defendant was not personally present in Missouri when his offer was accepted and the agreement was completed." And the contention was rejected "that an individual could not, either in law or within the meaning of the Constitution, commit a crime within a State in which he is not physically present at the time the crime is committed."

This court has recognized, therefore, that there may be a constructive presence in a State, distinct from a personal presence, by which a crime may be punished by an exercise of jurisdiction, that is, a person committing it may be brought to trial and condemnation. And this must be so if we would fit the laws and their administration to the acts of men and not be led away by mere "bookish theorick." We have held that a conspiracy is not necessarily the conception and purpose of the moment, but may be continuing. If so in time, it may be in place—carrying to the whole area of its operations the guilt of its conception and that which follows guilt, trial and punishment. As we have pointed out, the statute states what in addition to the agreement is necessary to complete the measure of the offense. The guilty purpose must be put into a guilty act.

We realize the strength of the apprehension that to extend the jurisdiction of conspiracy by overt acts may give to the Government a power which may be abused, and we do not wish to put out of view such possibility. But there are counter considerations. It is not an oppression in the law to accept the place where an unlawful purpose is attempted to be executed as the place of its punishment, and rather conspirators be taken from their homes than the victims and witnesses of the conspiracy be taken from theirs. We must not, in too great a solicitude for the criminal, give him a kind of immunity from punishment because of the dif-

ficulty in convicting him—indeed, of even detecting him. And this may result, if the rule contended for be adopted. Let him meet with his fellows in secret and he will try to do so, let the place be concealed, as it can be, and he and they may execute their crime in every State in the Union and defeat punishment in all. And the suppositions are not fanciful, as illustrated by a case submitted coincidently with this. Brown v. Elliott, post, p. 392. The possibility of such a result repels the contention and demonstrates that to yield to it would carry technical rules and rigidity of reasoning too far for the practical administration of criminal justice. We see no reason why a constructive presence should not be assigned to conspirators as well as to other criminals; and we certainly cannot assent to the proposition that it is not competent for Congress to define what shall constitute the offense of conspiracy or when it shall be considered complete and do with it as with other crimes which are commenced in one place and continued in another. Nor do we think that the size of our country has become too great for the effective administration of criminal justice. We held in Armour Packing Company v. United States, 209 U. S. 56, that the transportation of merchandise for less than the published rate is, under the Elins Act, a continuing offense, and that the Sixth Amendment of the Constitution of the United States, providing that an accused shall be tried in the State and District where the crime is committed, did not preclude a trial of the offense in any of the districts through which the transportation was conducted. See also Haas v. Henkel, 216 U. S. 462, 473.

In Robinson v. United States, in the Circuit Court of Appeals of the Eighth Circuit, the question was directly presented. 172 Fed. Rep. 105. The conspiracy passed on was alleged in the indictment to have been entered into in Cincinnati and Chicago, the overt acts set out were proved to have

been committed in Minneapolis and the evidence showed that it was the intention of the conspirators to carry out their conspiracy at Minneapolis. The trial court was moved to direct a verdict for the defendants if the jury found that the agreement was entered into in Cincinnati and Chicago and was complete when the parties went into the district of Minnesota. The instruction was refused and, the defendants having been convicted, the refusal was assigned as error, in the Circuit Court of Appeals, based on the provisions of the Constitution of the United States giving those accused of crime the right to trial by jury of the State and district wherein the crime shall have been committed.

The court, passing on the ruling of the trial court, said by District Judge Carland (p. 108), and we quote its language to avail ourselves not only of the citation of cases, but of the comments upon them.

"To the same effect are Commonwealth v. Gillespie, 7 Serg. & R. (Pa.), 469, 10 Am. Dec. 475; Noyes v. State, 41 N. J. Law, 418; Commonwealth v. Corlies, 3 Brewst. (Pa.), 575.

"If this was the law of venue in conspiracies at common law, where proof of an overt act was not necessary to show a completed offense, the same rule can be urged with much greater force under section 5440, Rev. St. U. S., as the offense described therein for all practical purposes is not complete until an overt act is committed.... It seems clear, then, that whether we place reliance on the common law or on section 731, Rev. St., the venue of the offense was correctly laid in the District of Minnesota, and the evidence sustained the allegation of the indictment."

To the cases cited by the learned court these may be added: State v. Nugent, 77 N.J.L. 84, 86; Bloomer v. State, 48 Maryland, 621; People v. Arnold, 46 Michigan, 268, 275; American Insurance Co. v. State, 75 Mississippi, 24; State

v. Hamilton, 13 Nevada, 386; International Harvester Co. v. Commonwealth, 137 Kentucky, 668, 674; Pearce v. Territory, 11 Oklahoma, 438; Ex Parte Rogers, 10 Tex. App. 655, and Raleigh v. Cook, 60 Texas, 438.

The contention is answered by the views which we have already expressed. As the overt acts give jurisdiction for trial, it is not essential where the conspiracy is formed so far as the jurisdiction of the court in which the indictment is found and tried is concerned. This is established by the cases which have been cited, and the question will be considered further in Brown v. Elliott, and Moore v. Elliott, cases submitted coincidently with this, post, p. 392.

The fifth, sixth, seventh and eighth assignments of error invoke the statute of limitation in behalf of Hyde and Schneider.

The plea of the statute as affected by overt acts was considered in United States v. Kissel, 218 U. S. 601, where it was declared that a conspiracy may be a continuing one, and the doctrine is applicable to the case at bar unless there is something special in the facts regarding Hyde and Schneider which constitutes a defense as to them. This is asserted. It is contended that the relation of Schneider to the conspiracy was only that of one rendering service as a servant of his master (Hyde), in consideration of the salary paid to him by his master, and that he had not within three years before the finding of the indictment participated in any way in the carrying out of the master's scheme, the subject of the conspiracy. And from this it is contended the question arises whether Hyde is not also entitled to the protection of the statute of limitation in so far as he is charged with conspiring with his employe Schneider.

But the fact that a salary was paid by one to another would not preclude a conspiracy between them. It might, indeed, mark a more humble criminal desire, and one which pre-

ferred a certain regard rather than take chances in the success of a criminal enterprise, and it was certainly not inconsistent with a full and active participation in the scheme. Indeed, Schneider, in a confession which we shall presently refer to, stated that a salary and the certainty of employment was his inducement.

The Government contends that there was such participation originally and to a time within the statute, and that there is nothing to show a repudiation of or withdrawal from the conspiracy by him before 1902, when he made a partial disclosure of the conspiracy to the Government.

The court charged the jury in substance that if Schneider had engaged in the conspiracy "back of the three year period" and the conspiracy contemplated that acts should be done from time to time through a series of years until the purposes of the conspiracy should be accomplished, although he, Schneider, did not do anything within the three year period but "remained acquiescent, expecting and understanding" that further acts should be performed, they, if performed, would be his acts "and would have the same effect against him as if he had done them himself. He would still be acting through his colleagues. He might be playing his part by keeping still as much as he did formerly by acting."

The contention of the defendants is that the statute begins to run from the last overt act within three years from the formation of the conspiracy within which there was conscious participation. (Italics ours.) The Government makes the counter contention that however true this may be as to accomplished conspiracies it is not true of one having continuity of purpose and which contemplated the performance of acts through a series of years. And that such a distinction can exist, we have seen is decided and illustrated in United States v. Kissel. And necessarily so. Men may have

lawful and unlawful purposes, temporary or enduring. The distinction is vital and has different consequences and incidents. The conspiracy accomplished or having a distinct period of accomplishment is different from one that is to be continuous. If it may continue it would seem necessarily to follow the relation of the conspirators to it must continue, being to it during its life as it was to it the moment it was brought into life. If each conspirator was the agent of the others at the latter time he remains as agent during all of the former time. This view does not, as it is contended, take the defense of the statute of limitation from conspiracies. It allows it to all, but make its application different. Nor does it take from a conspirator the power to withdraw from the execution of the offense or to avert a continuing criminality. It requires affirmative action, but certainly that is no hardship. Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished he is still offending. And we think, consciously offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence. The successive overt acts are but steps toward its accomplishment, not necessarily its accomplishment. This is the reasoning of the Kissel Case stated in another way. As he has started evil forces he must withdraw his support from them or incur the guilt of their continuance. Until he does withdraw there is conscious offending and the principle of the cases cited by defendants is satisfied.

But it is contended that under the instructions of the court Schneider was involved in criminality by overt acts done not only after he had ceased to be in Hyde's employ-

ment in any capacity, but after he had disclosed that there was a conspiracy against the Government. It was testified by Woodford D. Harlan that disclosure of frauds had come through one J. A. Zabriskie, he, however, knowing nothing about the matters except as informed by Schneider. The matter was referred to an agent who reported conversations with Schneider giving detailed information of the frauds and the manner by which they were accomplished. This report was received at the General Land Office in November, 1902. It does not appear what became of the report. The recollection of the witness was that he saw the report first, and he testified that he took it to the clerk who was distributing the mail, but for what purpose it does not appear. He never saw it again until one day during the trial. He, however, wrote to Benson about it, and after having seen weekly statements of certain special agents who were investigating the Schneider charges, he notified Benson. This seems to have been in March, 1903. Later, in October and November, 1903, he also wrote Benson at the suggestion of Detective Burns.

There are overt acts charged subsequent to the disclosure made by Schneider, and it is contended that by the instruction embodied in the seventh assignment of error Schneider was continued in the conspiracy by overt acts committed after his disclosure to the agent of the Land Department had been communicated to the Commissioner of the General Land Office.

(At p. 376.) "The first question is," the court charged, "Did the defendants conspire at all? The second question is whether they conspired to accomplish the end alleged. The third question is, whether they conspired to accomplish that end by the fraudulent means alleged, so far as the indictment in that respect is necessary to be proved, referring to what has been already stated in that respect. The

fourth question is, under each count, whether the overt act therein mentioned has been proved.

"Two other important questions must be determined in connection with the foregoing: One relating to the place, the other to the time. The conspiracy must have existed in the District of Columbia, and it must have existed and some overt act in pursuance of it must have been committed within three years next before the filing of the indictment."

And, assuming that the conspiracy was established and overt acts in furtherance of it shown in the District of Columbia, the court explained, "the conspiracy is here (the District of Columbia) just as truly as if the defendants were all here in person, doing those things with the common mind and purpose which contemplated them. In such circumstances the defendants would be conspiring together in the doing of each act because each act would have reference to the conspiracy. It would not be necessary that they should put their heads together and go over the terms of the conspiracy every time an act was done in furtherance of it. It would be enough if the act was an expression of their common understanding." Brown v. Elliott.

(At p. 399.) It is charged that on April 5, 1907 (first count), (see the Complaint in this case as to Counts, N. J. Curtis), and on April, 1907 (second count), the appellants and other persons "did then and there" conspire (we omit the adverbs). This might well be contended, so far as removal proceedings are concerned, as an allegation of the formation of the conspiracy in the District of Nebraska, or certainly a distinct and explicit renewal of it. And it would seem like giving technicality too much effect to consider that the agreement made in 1905, rather than its specific and formal renewal in 1907, should determine the jurisdiction of its trial. Besides, its continued existence and operation are alleged, and we have seen if overt acts were done prior to

1907 they may have been done at Omaha and constituted, with those done afterwards, a part of an entire scheme, to be executed by a succession of acts.

It is only by the assumption and insistence that the conspiracy was formed in 1905 that appellants give their contention any foundation whatever. If the conspiracy was formed at Omaha in 1907, upon the supposition that the conspiracy constitutes the offense and the State and district of its origin are the State and district of its trial, the District Court of Nebraska had jurisdiction. This follows, no matter where the overt act was done. We have pointed out, however, that the indictment does not show that the first overt act was done at a place and district unknown. The first overt act may have been performed at Omaha.

If either view, therefore, be accepted, the judgment of the Circuit Court dismissing the petition for habeas corpus must be affirmed.

If, however, we assume with appellants that the indictment charged that the conspiracy was formed in 1905 and at place unknown to the grand jurors, the same result must be pronounced, upon the authority of Hyde v. The United States, just decided, ante, p. 347. We there held that the place of trial could be any State and district where an overt act was performed. And we further held, following United States v. Kissel, 218 U. S. 601, that conspiracy might be a continuous crime. We there said, distinguishing a crime from its results: "But when the plot contemplates bringing to pass a continuing result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one." These remarks are especially pertinent to the case at bar.

It is alleged in the indictment that the conspiracy set forth was designed to be and was continuous, and, being so, every overt act was the act of all the conspirators, made so by the terms and force of their unlawful plot.

In Lanbaugh v. United States, 179 Fed. Rep. 476, the Circuit Court of Appeals for the Eighth Circuit considered the relation of the overt acts to the conspiracy and their effect in determining the application of the statute of limitations. The court said (p. 478), by Mr. Justice Van Devanter, then Circuit Judge: "While the gravamen of the offense is the conspiracy, the terms of section 5440 are such that there also must be an overt act to make the offense complete (Hyde v. Shine, 199 U.S. 62, 76); and so the period of limitation must be computed from the date of the overt act rather than the formation of the conspiracy. And where during the existence of the conspiracy there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found. Lorenz v. United States, 24 App. D. C. 337, 387; S. C. 196 U. S. 640; Ware v. United States, 84 CIC. A. 503, 154 Fed. Rep. 577, 12 L.R.A. (N.S.) 1053, S.C., 207 U.S. 588; Jones v. United States, 89 C. C. A. 303, 162 Fed. Rep. 417; S.C. 212 U. S. 576."

If, however the conspiracies may be regarded as distinct, then one is charged as having been formed at Omaha in April, 1907, and that overt acts were performed there to effect its object within three years of the finding of the indictment, to wit, October 7, 1909. These allegations establish the jurisdiction of the District Court of Nebraska and exclude the application of the statute of limitations.

As the place of the overt act may be the place of juris-

diction, it follows that the exact place where the conspiracy was formed need not be alleged. This case illustrates the evil which a contrary ruling would cause. The place where the conspiracy was formed was unknown to the grand jurors (and might be so in many cases), but it was intended to be executed in a number of States of the Union, and yet, under the rigor of the contention of appellants, the conspirators could not be tried in any of them. In other words, not the place of the activities of the conspiracy and where it incurs guilt, but the place of its formation, which no one may know or can find out, is the place of the jurisdiction of its trial. And what compels this? It is answered: The Sixth Amendment of the Constitution of the United States. We have determined otherwise in Hyde v. United States, ante 347.

The Constitution of the United States is not intended as a facility for crime. It is intended to prevent oppression, and its letter and its spirit are satisfied if where a criminal purpose is executed the criminal purpose be punished. It is there that its victims are sought and defrauded. It is there that its perpetrators should be brought to the bar of justice for their acts; not for the mere conception of them, but for the actual execution of them. The venue of his trial is thus made by the criminal himself, not determined by reasons or interests which may be adverse to him and used to his injury.

U.S.C.A. Tit. 8, Sec. 41. Equal rights under the law.—All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (R. S. Sec. 1977.)

Section 43. Civil action for deprivation of rights.—Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R. S. Sec. 1979.)

Section 47. Second. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, . . .; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Third. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or

Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. Secs. 563, 629.

Title 18 U.S.C.A. 88. Conspiring to commit offense against United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of such conspiracy, each of the parties to such conspiracy shall not more than $10,000, or imprisoned not more than two years, or both. (R. S. Sec. 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1907, c. 321, Sec. 37, 35 Stat. 1069.

Any two or more persons who shall combine, unite, confederate, conspire or bind themselves by oath, covenant, agreement, or other alliance:

a. To commit a crime; or b. Falsely and maliciously to indict another for a crime, or to procure another to be charged or arrested for a crime; or c. Falsely to institute and maintain any suit; or d. To cheat and defraud a person of any property by any means which are in themselves criminal; or e. To cheat and defraud a person of any property by any means which if executed, would amount to a cheat; or f. To obtain money by false pretenses; g. . . .; h. To commit any act for the perversion or obstruction of

justice or the due administration of the laws—shall be guilty of conspiracy and be liable to the same penalty as persons convicted of a misdemeanor (R. S. of New Jersey. Ch. 119. Conspiracy. 2:119-1).

If two or more persons conspire:

(1). To commit a crime; or, (2). Falsely and maliciously to indict or convict another for any crime, or to procure another to be charged or arrested for any crime; or (3). Falsely to move or maintain any suit, action or proceeding; or, (4). To cheat and defraud any person of any property by any means which are in themselves criminal, or by any means which if executed would amount to a cheat, or to the obtaining of money or property by false pretenses; or (5). To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws; they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding $1,000. (R. S. of Utah. Conspiracy. Chapter 11. Criminal Conspiracy Defined.)

U.S.C.A. Title 15, Sec. 1.—Trusts, etc. in restraint of trade illegal; penalty.—Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 3. Trusts in Territories or District of Columbia illegal; penalty.—Combination a misdemeanor. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal.

Section 4. Jurisdiction of Courts, procedure.

The several district courts of the United States are invested with jurisdiction to prevent and restrain violation of Sections 1 to 7, inclusive, or Section 15 of this chapter. July 2, 1890, c. 647, Sec. 4, 26 Stat. 209; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.

Section 5. Bringing in Additional parties.

Whenever it shall appear to the court before which any proceeding under Section 4 of this chapter may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof. July 2, 1890, c. 647, Sec. 5, 26 Stat. 210.

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefore in a district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fees. (Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731.)

Section 24. Liability of directors and agents of corporations.

Whenever a corporation shall violate any of the penal provisions of the anti-trust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation.

Section 26. Injunctive relief for private parties; exceptions.—Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws. . . .

U.S.C.A. Title 28, Section 41, subd. (1) last sentence. The foregoing provisions as to the sum or value in the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of the section. R. S. 563; Mar. 3, 1875, Sec. 1, 25 Stat. 433; Mar. 3, 1911, c. 231, Sec. 24, 36 Stat. 1091.

Subd. (2). Crimes and offenses. Second. Of all crimes and offenses cognizable under the authority of the United States. (R. S. 563, pars. 1, 2, Sec. 629, pars. 19, 20; Mar. 3, 1875, c. 137, Sec. 1, 18 Stat. 470; Mar. 3, 1887, c. 373, Sec. 1, 24 Stat. 552; Aug. 13, 1888, c. 866, Sec. 1, 25 Stat. 433; Mar. 3, 1911, C. 231, Sec. 24, par. 2, 36 Stat. 1091.

Subd. (12). Suits Concerning Civil Rights. Twelfth. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 47 of Tit. 8 U.S.C.A. (R. S. 563, par. 11, Sec. 629, par. 17; Mar. 3, 1911, c. 231, Sec. 24, par. 12, 63 Stat. 1092.)

Subd. (14). Suits to redress deprivation of civil rights. Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any state, of any right, privilege or immunity, secured by the Constitution of the United States,

or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or (R. S. 563, par. 12, Sec. 629, par. 16; Mar. 3, 1911, c. 231, Sec. 24, par. 14, 36 Stat. 1092.) Historical Note. This paragraph merges the jurisdiction which had been vested in the District Court by par. 12 of R. S. 563; "The sum or value of the matter in controversy" is immaterial. See last sentence of Subd. (1) of this Section. (41 U.S.C.A. Title 28.)

Subd. (17). Suits by Aliens for Torts. Seventeenth. Of all suits brought by any alien for a tort only, in violation of the laws of Nations or of a treaty of the United States. (R. S. Sec. 563, par. 16; Mar. 3, 1911, c. 231, Sec. 24, par. 17, 36 Stat. 1093.) "The sum or value of the matter in controversy" is immaterial. See last sentence of Subd. (1) of Sec. 41 U.S.C.A. Title 28.

Subd. (23). Suits against trusts, monopolies, and unlawful combinations. Twenty-third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies. (Mar. 3, 1911, c. 231, Sec. 24, par. 23, 36 Stat. 1093.) Historical Note. "The sum or value of the matter in controversy" is immaterial. See last sentence of subd. (1) of Sec. 41 U.S.C.A. Tit. 8.

"The jurisdiction in civil and criminal matters conferred on the district court by the provisions of Chapter 3 of Title 8, and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; . . .". Section 729 of Title 28, U.S.C.A. (R. S. Sec. 722). See also pp. 8-9 of the first printed part of the Motion to Strike and Opposing Affidavit thereto. The section is there set forth in full.